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In the Supreme Court of the United States

OCTOBER TERM, 1998

SHAMROCK FARMS COMPANY
and SHAMROCK FOODS COMPANY,
Petitioners,

v.

ANN M. VENEMAN, Secretary, Department of Food & Agriculture, State of California, and RICHARD TATE, Chief, Milk and Dairy Food Control Branch, Division of Animal Industry, Department of Food and Agriculture, State of California,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred when it relied on legislative history and other ordinary incidents of statutory construction to hold that Congress abrogated the requirements of the dormant Commerce Clause.

RULE 29.6 STATEMENT

Shamrock Farms Company and Shamrock Foods Company are privately held companies whose shares are not publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Shamrock Farms Company and Shamrock Foods Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 146 F.3d 1177. The opinions of the district court (App., *infra*, 13a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1998, and a timely petition for rehearing was denied on August 17, 1998. App., *infra*, 30a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

Section 144 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7254, provides:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue in effect any law, regulation, or requirement regarding:
>
> > (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

STATEMENT

In its decision in this case, the court of appeals held that Congress displaced the strictures of the dormant Commerce Clause that otherwise would invalidate a California milk marketing program that impedes, and discriminates against, interstate commerce. That holding — which relies upon ambiguous congressional language and unilluminating bits of legislative history — misapplies and distorts the "clear statement" rule that this Court has laid down to govern cases of this sort. Because the ruling below cannot be reconciled with the decisions of this Court, conflicts with holdings of other courts of appeals, threatens vastly to multiply state-imposed burdens on interstate commerce, and resolves a matter of great practical importance, review by this Court is warranted.

1. Petitioner Shamrock Farms Company operates a dairy farm in Arizona and sells the raw milk that it produces to petitioner Shamrock Foods Company (collectively "Shamrock"), a milk processor also located in Arizona. Shamrock Foods in turn distributes fluid milk products from milk produced by Arizona dairy farmers to customers in a number of western States, including California. See App., *infra*, 1a.

All raw milk contains both fat and so-called solids-not-fat ("SNF"), the amounts of which vary slightly from breed to breed, region to region, season to season, plant to plant, and farm to farm. While it is possible to modify the SNF content of milk by introducing fortifying agents, Shamrock does not add milk powder or other products to change the naturally occurring SNF level of its farm milk. Shamrock's milk conforms to the "standards of identity" adopted by the United States Food and Drug Administration ("FDA") to identify the SNF and milkfat content of various types of milk. 21 U.S.C.

§ 341. As described by the FDA, standards of identity are essentially ingredient recipes for common foods. 60 Fed. Reg. 67492, 67494-95 (Dec. 29, 1995) (FDA Notice of proposed rulemaking). For fluid milk products, FDA standards regulate the SNF and milkfat content. 21 C.F.R. § 131.110 *et seq.* These standards allow for natural variation in SNF and fat content, and in the FDA's judgment "bear a reasonable relationship to the composition of milk as it comes from the cow." 38 Fed. Reg. 27924-25 (Oct. 10, 1973); App., *infra*, 2a.

For many years, the State of California has imposed ingredient requirements on milk sold in-state that differ from the FDA standards. See App., *infra*, 2a. California generally mandates an SNF content that is higher than that established by the FDA and requires more fat in whole milk than does the FDA standard. California Food & Ag. Code §§ 35784, 38181, 38211. Compliance with California's standards requires the seasonal addition of milk solids to skim and whole milk, and requires the addition of solids to lowfat 1% and 2% milk throughout the year. In markets outside California, more than 90% of fluid milk sales are of plain milk rather than of the solids-added variety, and FDA-standard whole milk contains 3.27% fat on average in contrast to the 3.5% required in California. See C.A. Excerpts of Record Vol. II, p. 226. As a result, almost all milk sold elsewhere is of varieties that do not conform to California product definitions.

California's application of its milk standards also differs from national standards by *prohibiting* the sale of nonconforming varieties "no matter what words the distributors wish to place on the cartons." App., *infra*, 26a. In contrast, under FDA rules the marketing of non-conforming products presents only labeling issues. See 21 C.F.R. §§ 101.3(e) and 130.10. California's requirements therefore effectively preclude Shamrock from selling its whole and skim milk in the State during certain seasons,

while altogether precluding distribution in California of plain lowfat milk such as that produced by Shamrock and others in markets outside California. See App., *infra*, 3a.

In addition to its milk composition standards, California has adopted milk pricing and pooling laws. Under these provisions, the State sets minimum prices that California processors must pay to producers for the raw milk that they have supplied. Statewide milk revenues are then pooled and redistributed to producers on a uniform basis. California Food & Ag. Code ch. 2, § 61801 *et seq.*; ch. 3, § 62700 *et seq.* Under these laws, the price paid by processors is based in substantial part on the milk's SNF content, with a higher price paid for milk that contains a higher level of SNF. As part of this program, California provides in-state producers with a "fortification allowance," which reduces the cost of milk solids purchased to comply with the State's SNF requirements. No comparable allowance is provided to out-of-state processors like Shamrock who would have to purchase milk solids to satisfy California's SNF standards. See App., *infra*, 3a.

2. In 1990, Congress enacted the Nutritional Labeling and Education Act ("NLEA"), which in relevant part prohibited States from enforcing standards of identity that are inconsistent with the federal standards established by the FDA. 21 U.S.C. § 343-1(a). In 1992, Shamrock accordingly began selling its milk in California. In October of that year, the California Department of Food and Agriculture ("CDFA") advised Shamrock that its milk would be impounded because it did not meet state standards. See *Shamrock Farms Co.* v. *Veneman*, CIV-S-95-318 (E.D. Cal. June 5, 1995), slip op. 2. Shamrock responded by bringing suit in federal court, contending that the California standards were preempted by the NLEA. The district court agreed, holding that "California milk identity standards not identical to federal standards are preempted as applied to milk produced by Shamrock from cows outside California,

processed by Shamrock outside California, and subsequently sold within California." *Id.*, slip op. 3. See App., *infra*, 14a-15a.

On April 4, 1996, the President signed into law the Federal Agriculture Improvement and Reform Act of 1996 ("the Farm Bill"), the legislation that is principally at issue in this case. Section 144 of that Act, 7 U.S.C. § 7254, saves the California standards of identity from preemption, providing:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue in effect any law, regulation, or requirement regarding:
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Three weeks after enactment of the Farm Bill, the CDFA advised Shamrock that it would enforce the State's standards. See App., *infra*, 15a.[1]

Shamrock then brought this suit in the United States District Court for the Eastern District of California, contending that California's milk composition standards and

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[1] In July 1996, the State filed a civil complaint against Shamrock in state court, seeking monetary penalties because Shamrock's milk did not satisfy California's standard of identity requirements. The trial court ruled for the State, enjoining Shamrock's sale of milk that does not meet state standards and imposing a civil penalty of $696,000. Shamrock's appeal of the penalty is pending. *People* v. *Shamrock Foods Co.*, No. D031041 (Cal. App., 4th Dist.). The appeal does not present the federal issues raised in this petition.

pricing and pooling laws violate the Commerce Clause of the federal Constitution. Relying on Section 144 of the Farm Bill, California responded by asserting that its regime is authorized by federal law. The district court accepted the State's argument, reasoning that "the phrase 'provision of law' [in Section 144] includes the Supreme Court's decisions defining the operation of the dormant Commerce Clause." App., *infra*, 28a. For that reason, the court held that Section 144 "exempts California from the strictures of th[e Commerce] [C]lause." *Id.* at 27a. See also *id.* at 17a.

The Ninth Circuit affirmed. App., *infra*, 1a-12a. The court did not deny that California's milk laws impede interstate commerce and discriminate against out-of-state milk producers. See *id.* at 5a. Instead, the court declared that its "analysis * * * turns on whether Congress has indeed authorized California to adopt and enforce its regulatory scheme regardless of the effect it may have on interstate commerce." *Ibid.* The court also concluded that "[t]he requisite [congressional] intent may be gleaned both from the language of the relevant statute and from the legislative history." *Id.* at 6a.

From this starting point, the court found that Section 144 of the Farm Bill insulates California's milk composition rules from constitutional attack because "by using the expression 'any other provision of law' in the context it did here, Congress demonstrated its intent to encompass all law, whether it be statutory law, common law, or constitutional law." App., *infra*, 6a. The court added that, "[w]hile neither the Constitution nor any individual article or amendment may be 'a law,' constitutional provisions are in ordinary English usage 'provisions of law.' That the Constitution is part of the law of this nation would seem to be beyond dispute." *Id.* at 7a.

While the court of appeals acknowledged that Section 144 "does not specifically refer to [California's pricing and

pooling] laws" (App., *infra*, 9a), the court proceeded to find that those provisions also had been authorized by Congress. The court explained that, "[b]ecause the pricing and pooling laws are not specifically referenced in the statute, * * * it is important to consider the legislative history here." *Id.* at 10a n.2. Relying exclusively on the statements made at a congressional hearing by one California congressman and an official of the Dairy Institute of California, the court went on to hold that the "legislative history" "amply support[s]" the conclusion that the pricing and pooling provisions "fall under the ambit of [Section 144's] prohibition against indirect limitations on laws, regulations, or requirements regarding milk standards." *Id.* at 9a-10a. The court therefore ruled that "California's milk pricing and pooling laws are also exempted from Commerce Clause challenge." *Id.* at 10a.

REASONS FOR GRANTING THE PETITION

This case involves a recurring question of great significance: how to determine whether Congress abrogated the dictates of the dormant Commerce Clause and authorized a State to impede the flow of interstate commerce. That question arises with great frequency.[2] But the Ninth Circuit's answer to the question — that California may restrict interstate commerce on the basis of ambiguous congressional language and opaque snippets of legislative history — is insupportable. The Ninth Circuit's approach departs from this Court's consistent holdings that congressional intent to

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[2] See, *e.g.*, *United Egg Producers* v. *Department of Agric. of the Commonwealth of Puerto Rico*, 77 F.3d 567 (1st Cir. 1996); *JDS Realty Corp.* v. *Government of the Virgin Islands*, 824 F.2d 256 (3d Cir. 1987), vacated on mootness grounds, 484 U.S. 999 (1988); *Norfolk S. Corp.* v. *Oberly*, 822 F.2d 388 (3d Cir. 1987); *Environmental Tech. Council* v. *Sierra Club*, 98 F.3d 774 (4th Cir. 1996); *Chemical Waste Management, Inc.* v. *Templet*, 967 F.2d 1058 (5th Cir. 1992); *Middle S. Energy, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985).

waive the requirements of the Commerce Clause must be stated expressly and unambiguously. It ignores the rule, also applied repeatedly by this Court, that a "clear statement" of congressional intent may not by provided by legislative history. It is irreconcilable with the approach taken by other courts of appeals. And it threatens to throw into confusion the proper method of analysis in all areas of the law (including not only the Commerce Clause, but also the Eleventh Amendment, retroactivity, and the sovereign immunity of the United States) in which the dispositive inquiry is whether Congress has made its intentions unambiguously clear.

Entirely apart from the importance of the Ninth Circuit's decision as a matter of constitutional doctrine, review of the decision below is warranted because it settled a matter of great practical importance. It upheld a state law that discriminates against interstate commerce and effectively precludes out-of-state dairy competitors from entering the largest market in the Nation. As a consequence, the court of appeals' holding already is fomenting tension between the States. For these reasons, the Ninth Circuit's decision should not stand.

A. The Court Of Appeals' Decision To Uphold The Composition Standards Rests On A Misunderstanding Of The Requirement That Congress Expressly State An Unambiguous Intention To Abrogate The Dormant Commerce Clause

1. In upholding California's milk composition requirements, the court of appeals purported to find that the text of Section 144 is "unmistakably clear" in displacing the restrictions of the Commerce Clause. App., *infra*, 9a; see *id.* at 6a-7a. But the court's analysis is notable for what it *failed* to do. The court pointed to nothing in the statutory text (or in the legislative history) indicating that Congress

affirmatively intended to permit state regulation that otherwise would violate the Commerce Clause. Nor did the court even attempt to identify evidence indicating that *any* Member of Congress *actually* had the Commerce Clause in mind at the time of Section 144's enactment. Nor, for that matter, did the court suggest that the negative language of Section 144 ("[n]othing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit * * *") affirmatively *authorizes* California to impose otherwise unconstitutional restrictions on interstate commerce. In these circumstances, the Ninth Circuit's approach cannot be squared with the analysis mandated by this Court.

This Court has held repeatedly that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve * * * violation of the Commerce Clause." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992). As a consequence, "[i]n the instances in which [the Court has] found such consent, Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was *expressly stated.*" *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) (emphasis added) (citation and internal quotation marks omitted). And while the Court has not required use of any particular "talismanic" form of words, it has insisted that, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear.*" *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added). This means that "when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946), [courts] have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982). The Court has stated this rule repeatedly in the most forceful possible

terms. See, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment) ("Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause") (citation omitted); *Wyoming* v. *Oklahoma*, 502 U.S. at 458 (State has the "burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce"); *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) (there must be an "unambiguous statement of [] congressional intent * * * 'to alter the limits of state power otherwise imposed by the Commerce Clause'") (citation omitted); *South-Central Timber*, 467 U.S. at 90 ("on those occasions in which consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been 'expressly stated'") (citation omitted).

The reason for this requirement that Congress *actually* have intended to displace the Commerce Clause is plain:

> The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying [the] dormant Commerce Clause doctrine. It is not * * * merely a wooden formalism. The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. * * * On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. *A rule requiring a clear*

> *expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.*

South-Central Timber, 467 U.S. at 91-92 (emphasis added; citations and footnote omitted). See *Taylor*, 477 U.S. at 139.

The Court has insisted on the same degree of clarity in other areas where the nature of the interests at stake make it essential to have confidence that Congress intended a particular result. In the Eleventh Amendment setting, for example, the Court will find that Congress abrogated state sovereign immunity only if that intention is made "'unmistakably clear in the language of the statute.'" *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)). The Court likewise will find that Congress waived the sovereign immunity of the United States only where the intent to do so is "unequivocally expressed." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). And the Court will hold a statute to apply retroactively only when there is "a clear statutory expression of congressional intent." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997).

2. Section 144 manifestly does not satisfy this standard. To be sure, the court of appeals gave a wink to the requirement of unmistakable clarity demanded by this Court. See App., *infra*, 6a. But the Ninth Circuit fundamentally misunderstood the meaning of that requirement, applying an analysis that made use of all of the ordinary incidents of statutory construction that come into play even when there is *no* need for special clarity. Indeed, this case graphically illustrates the dangers of a loose application of the "clear statement" Commerce Clause rule: far from expressing an unambiguous intent to waive Commerce Clause requirements, there is every reason to *doubt* that Congress meant to displace constitutional protections for commerce. If not set aside, the

Ninth Circuit's ruling therefore will lead to the very result feared by this Court — causing "[u]nrepresented interests [to] bear the brunt of regulations imposed by one State" — while likely leading other courts astray when similar issues arise in the future.

In holding that Section 144 permits state regulation that otherwise would violate the Commerce Clause, the court of appeals opined that the statute's reference to "other provisions of law" must be deemed to include the Commerce Clause because "constitutional provisions are in ordinary English usage 'provisions of law'" and "[t]hat the Constitution is part of the law of this nation would seem to be beyond dispute." App., *infra*, 7a. But this blithe assertion misses the basic point. Even if the Ninth Circuit's semantic construct is plausible, its reading is hardly compelled by the statutory language — and nothing in Section 144 gives the slightest indication that Congress "affirmatively contemplate[d]" overriding the Commerce Clause. Indeed, on examination the Ninth Circuit's holding is insupportable.

First, the plain statutory language does not support the court of appeals' ruling. Because Section 144 refers to "*this Act* or any *other* provision of law," the "other provision[s]" are most naturally understood to encompass other *statutes* (in particular, the NLEA). Congress's instruction that the 1996 Farm Bill and other laws addressed by Section 144 not be "construed" to affect California's authority also strongly suggests that the scope of the section must be limited to federal statutes; Congress is not, after all, in the habit of directing the courts to construe *constitutional* provisions in a particular way. Had Congress wanted to abrogate the dormant Congress Clause, it presumably would have said just that, rather than instruct courts to "construe[]" the Clause not to reach California law. And Section 144 is not phrased as a broad, affirmative grant of authority to all States, which again suggests that Congress had a narrow focus in mind.

Second, the court of appeals reasoned that Congress "could easily have chosen to use narrow language" in Section 144 in lieu of the reference to "any other provision of law," and that Congress's selection of this latter phrase "connotes a much broader concept." App., *infra*, 7a. In fact, however, Congress routinely uses the term "notwithstanding any other provision of law" in circumstances where it unquestionably has in mind other federal *statutes and regulations*.[3] Conversely, Congress's invariable approach is to refer expressly to "the Constitution and laws" of the United States

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[3] See, *e.g.*, 8 U.S.C. § 1622(a) ("[n]otwithstanding any other provision of law * * * a State is authorized to determine the eligibility for any State public benefits of an alien * * * who is paroled into the United States"); 8 U.S.C. § 1624(a) ("notwithstanding any other provision of law, a State or political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of a State or a political subdivision of a State * * *"); 21 U.S.C. § 862b ("[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances * * *"); 42 U.S.C. § 6316(a)(8) ("notwithstanding any other provision of law, a regulation or other requirement adopted by a State or subdivision of a State contained in a State or local building code for new construction concerning the energy efficiency or energy use of an electric motor * * * is not superseded by the standards * * * established or prescribed under section 6313(b) of this title * * *"); 42 U.S.C. § 7509a(a) ("[n]otwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator [if specified conditions are met]"); 49 U.S.C. § 13713(a) ("[n]otwithstanding any other provision of law, it shall not be unlawful for a seller of food and grocery products using a uniform zone delivered pricing system to compensate a customer who picks up purchased food and grocery products at the shipping point * * *").

when it wants to reach both sources of authority.[4] There is absolutely no reason to believe that Congress meant to depart from this ordinary usage when it placed the standard phrase "any other provision of law" in Section 144. The court of appeals' contrary conclusion disregards the statutory context and threatens to cause mischief in the interpretation of many other enactments.[5]

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[4] At least 54 federal statutes refer to the federal "Constitution and laws." See, *e.g.*, 42 U.S.C. § 1983 (deprivation of any "rights, privileges, or immunities secured by the Constitution and laws"). At least 18 additional statutes refer to the "Constitution or laws of the United States." See, *e.g.*, 18 U.S.C. § 2255 (providing relief when sentence imposed "in violation of the Constitution or laws of the United States"). At least nine more statutes refer to the "Constitution, treaties, or laws" (or "Constitution, laws, and treaties") of the United States. See, *e.g.*, 28 U.S.C. § 1257 (this Court has jurisdiction to review state court judgments challenged as repugnant to the "Constitution, treaties, or laws of the United States"). And at least 14 federal statutes refer to the "constitution and laws" of the States. See, *e.g.*, 42 U.S.C. § 2297h-2(d) (offering or sale of securities subject to "the provisions of the Constitution and laws of any State, territory, or possession).

[5] In fact, the Ninth Circuit's discussion of the statutory language demonstrates just how far that court departed from this Court's directions. In contrast to what it believed to be the limitless language used in Section 144, the court of appeals opined that Congress "could easily have chosen to use narrower language, such as 'any federal law or regulation,'" a phrase that the court believed *excludes* the Commerce Clause and "plainly refers to statutory enactments, their implementing rules and regulations, and probably even to decisional law." App., *infra*, 7a. But this is logic chopping of the first order. It is not at all apparent that the phrase "this Act or any other provision of law" (which the court held clearly *to* include the Constitution) is broader than the phrase "any federal law or regulation" (which the court thought "plainly" does *not* include the Constitution). The Ninth Circuit must have believed

Third, the legislative background and history establishes that Congress was thinking about statutory preemption and *not* the Commerce Clause when it enacted Section 144. In the hearings that preceded enactment of the Farm Bill, supporters of the legislation focused exclusively on the preemptive force of the NLEA, and on the injunction issued pursuant to that statute in the earlier suit brought by Shamrock. There was no discussion at all about the Commerce Clause.[6] Similarly, the only relevant floor

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that the Constitution is an "other provision of law" but not a provision of "federal law." That strikes us as quite an improbable distinction. And the more fundamental point is that any reading that turns on such carefully nuanced onion peeling cannot possibly involve a statute in which the congressional intent is "expressly stated."

[6] See *Hearings Before the Subcomm. on Livestock, Dairy & Poultry of the House Comm. on Agriculture*, 104th Cong., 1st Sess. 435 (Apr. 20, 1995) (statement of Rep. Bill Thomas) (in response to the NLEA suit, proposed to "exempt California standards from the federal requirement"); *id.* at 458 (statement of Jim Tillison, Alliance of Western Dairy Producers) (NLEA "preempts state standards of identity. We ask the Subcommittee's support in getting legislation passed that * * * exempts California standards from federal preemption."); *id.* at 460 (statement of Lewis Aukeman, President, California Milk Producers) (California composition standards "are being challenged today"); *id.* at 464 (statement of Paul A. Rollin, Director, Danish Creamery Association) ("[p]reemption of state standards * * * was not the intent of the NLEA drafters"); *id.* at 480-481, 568 (statement of Craig Alexander, Dairy Institute of California) ("It was of concern to our members that federal preemption of the California standards took place under the [NLEA] without consideration of the longstanding tradition of our program. * * * At this point, California standards are being challenged by an out-of-state company and some of California's fluid processors have lost business to out-of-state competitors with lower Federal solids milk products."); *id.* at 517

discussion in Congress about Section 144 concerned the provision's effect on the NLEA and on the suit that had been brought to enforce that statute. See 142 Cong. Rec. H1486 (Fed. 28, 1996) (statement of Rep. Thomas) ("there is a federal court order telling California that they cannot enforce their own milk standards"). It therefore comes as no surprise that, when it came time to explain Section 144, the Conference Report stated flatly that "[t]he conference-adopted bill provides the State of California an exemption *from the preemption provisions of any Federal law* respecting standards of identity and labeling for fluid milk." H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 338 (1996) (emphasis added).

This makes plain that Congress had in mind statutory preemption provisions (presumably of the NLEA) and at no point considered the relevance of the dormant Commerce Clause. And needless to say, a congressional desire to avoid preemption is not the same thing as, and cannot substitute for, an affirmative intent to displace the dormant Commerce Clause. See, *e.g.*, *Sporhase*, 458 U.S. at 959 (statutory language providing that "'nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory'" described as "defin[ing] the extent of the federal legislation's pre-emptive effect on state law" and not authorizing States to violate the Commerce Clause). Indeed, the only reference in the legislative history to Section 144's effect on interstate commerce made precisely that point: the chairman of the subcommittee that produced the legislation explained that "Section 144 is offered in an attempt to exempt California from existing Federal standards for the solids not fa[]t content in Class I (fluid) milk." He added that, "[r]egrettably," the

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(statement of A.J. Yates, Deputy Secretary of the California Department of Food and Agriculture) (preemption provision of NLEA "should be repealed by Congress").

California standards probably "would become a barrier to interstate commerce in fluid milk and, as a result, will likely spawn years of additional lawsuits on this issue." 142 Cong. Rec. H3153 (Mar. 28, 1996) (statement of Rep. Gunderson). He thus made clear that it was not Congress's intent affirmatively to authorize dormant Commerce Clause violations, and that it remained up to the courts to resolve the merits of Commerce Clause challenges to the California regime.[7]

The Ninth Circuit's error accordingly is plain. But for present purposes, the important point is not that the court of appeals misunderstood the meaning of Section 144; it is, instead, that the court's misapplication of the clear statement requirement works a dangerous departure from the standard governing abrogations of the dormant Commerce Clause. That decision threatens to infect the analysis in all cases involving application of constitutionally based clear statement rules. For these reasons, further review is in order.

B. The Court Of Appeals' Decision To Immunize The Discriminatory Pricing and Pooling Laws Improperly Relied On Legislative History

1. The court of appeals went even further astray in holding that California's milk pricing and pooling laws are immune from Commerce Clause challenge. The court made no attempt to show that these provisions are authorized by the text of Section 144. Nor could it. By its plain terms, Section 144 addresses only state laws that relate either to the percentage of milk solids or solids not fat required in fluid

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[7] Moreover, even if Congress is thought to have had the Commerce Clause in mind, there is no reason to believe that Congress would have wanted to do more than validate state *labeling* requirements; California's ban on the *sale* of safe and healthy non-conforming products is completely foreign to national food regulation practices.

milk marketed in California, or to the labeling of such products with regard to those solids. But the pricing and pooling laws address the very different subjects of milk prices and subsidies for milk processors. The Ninth Circuit's holding that these state restrictions were authorized by Congress — even though they concern issues that on the face of it are not addressed by Section 144, and even though the court of appeals conceded that the federal statute "does not specifically refer to these [California] laws" (App., *infra*, 9a) — is a dangerous departure from this Court's precedents that gives courts a virtually unlimited license to find congressional abrogations of the Commerce Clause.

In holding that Section 144 waived the requirements of the Commerce Clause as to the pricing and pooling laws, the court of appeals began with its finding that Section 144 authorizes the state composition provisions. The court then went on to rely on its sense that "the pricing and pooling laws were adopted in order to assist milk producers in complying with the milk content provisions." App., *infra*, 10a. In making this determination, the court found it "important to consider the legislative history" because "the pricing and pooling laws are not specifically referenced in the statute." *Id.* at 10a n.2. See *id.* at 6a ("The requisite [congressional] intent may be gleaned both from the text of the relevant statute and from the legislative history."). The panel concluded that the legislative hearings that preceded enactment of Section 144 "demonstrate[] that Congress intended that the milk pricing and pooling scheme be included in the exemption as a means of effecting California's milk composition standards." *Id.* at 10a (footnote omitted).

This sort of *gestalt* approach to the Commerce Clause, however, is flatly inconsistent with this Court's precedents. Even assuming for the moment that Section 144 does abrogate the Commerce Clause as to California's content requirements and product prohibitions, Congress's intent to immunize state pricing and pooling laws from Commerce Clause attack can

hardly have been "expressly stated" (*Sporhase*, 458 U.S. at 960) or made "'unmistakably clear'" (*C&A Carbone*, 511 U.S. at 408 (O'Connor, J., concurring in the judgment) (quoting *South-Central Timber*, 467 U.S. at 91)) when, as in this case, the federal enactment concededly makes *no* reference to those state laws at all. And in closely analogous areas where the Court also has set out a "clear statement" rule, it has forcefully rejected the sort of reliance on legislative history that the court of appeals found crucial in establishing that "the milk pricing and pooling laws were considered by all concerned to be an important element of California's milk regulation scheme." App., *infra*, 10a.

In cases involving the Eleventh Amendment, for example, the Court has held repeatedly that it will find that

> Congress intended to abrogate [state] sovereign immunity only if its intention is "unmistakably clear in the language of the statute." *Atascadero*, 473 U.S., at 242. * * * Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.

Dellmuth, 491 U.S. at 230. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 56 (1996) (citations and internal quotation marks omitted) ("we have applied a simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute"); *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) ("the Court will not look to legislative history in making its inquiry"); *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 104

(1989) (plurality opinion) ("If congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if it is not, *Atascadero* will not be satisfied. * * * [A]ttempts * * * to construe [a statute said to override the Eleventh Amendment] in light of the policies underlying [the statute] are unavailing. These arguments are not based in the text of the statute and so, too, are not helpful in determining whether the command of *Atascadero* is satisfied."); *Atascadero*, 473 U.S. at 243 ("Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself").

The Court has similarly eschewed any recourse to legislative history when applying the clear statement rule used to determine whether a statute was meant to waive the United States' sovereign immunity.

> A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text * * *. A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."

Lane, 518 U.S. at 192, quoting *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). See *Nordic Village*, 503 U.S. at 37 ("[i]f clarity does not exist [in the statutory text], it cannot be supplied by a committee report"). The Court likewise has held that legislative history cannot supply the clear statement necessary to establish that Congress meant legislation to apply retroactively. *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2064 & n.4 (1997). See also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 287 (1994) (Scalia, J., concurring in the judgment) ("[i]f it is a 'clear statement' we are seeking, * * * the statement must clearly reflect general agreement.

No legislative history can do that, of course, but only the text of the statute itself").

The same rule must apply here. Indeed, Justice O'Connor expressly has recognized as much, rejecting the argument that legislative history may establish Congress's intent to override dormant Commerce Clause requirements when the legislative intent relied upon by the State is "not reflected in the text of the statute. * * * [I]solated references [in the legislative history] do not satisfy our requirement of an explicit statutory authorization." *C&A Carbone*, 511 U.S. at 410 (O'Connor, J., concurring in the judgment) (citing *Dellmuth* and *Nordic Village*).[8] The necessity for this rule is apparent. In the best of circumstances, "[r]eliance on * * * isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.'" *New England Power*, 455 U.S. at 342 (quoting *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977)). And reliance on such easily manipulable evidence is wholly inappropriate in the Commerce Clause setting, where it is essential that Congress *actually* consider the issue and act *affirmatively* before individual States are permitted to restrain interstate commerce.

2. In fact, this case is a textbook example of *why* the Court has rejected use of legislative history to justify a

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[8] The court of appeals cited this Court's decision in *Sporhase* for the proposition that congressional intent to abrogate the Commerce Clause "may be gleaned both from the language of the relevant statute and from the legislative history." App., *infra*, 6a. But *Sporhase* contains no such statement, and did not in fact look to legislative history at all. See 458 U.S. at 958-960. While the Court occasionally has described legislative history in Commerce Clause cases (see *Taylor*, 477 U.S. at 139, and *New England Power*, 455 U.S. at 342-343), it has not relied on legislative history to find that Congress authorized States to impede or discriminate against interstate commerce.

finding that Congress abrogated dormant Commerce Clause requirements. The court of appeals held that the legislative history "demonstrates that Congress intended that the milk pricing and pooling scheme be included in the [Section 144] exemption as a means of effecting California's milk composition standards" (App., *infra*, 10a), adding the breezy assertion that "[f]rom all accounts, the milk pricing and pooling laws were considered by all concerned to be an important element of California's milk regulation scheme." *Ibid.* The court's only support for these assertions was a pair of statements (made by a California congressman and a representative of the Dairy Institute of California) at a hearing conducted *in* California a year prior to enactment of the Farm Bill. App., *infra*, 10a, citing *Hearings Before the Subcomm. on Livestock, Dairy & Poultry of the House Comm. on Agriculture*, 104th Cong., 1st Sess. 435 (Apr. 20, 1995) ("*Hearings*") (statement of Rep. Bill Thomas); *id.* at 480, 568 (statement of Craig Alexander, executive director, Dairy Institute of California). On examination, however, these statements simply do not stand for the proposition advanced by the court of appeals.[9]

More fundamentally, however, even if the statements did say what the court of appeals believed they did, it is hardly likely that any member of Congress other than the five in attendance was aware that the hearing had been conducted. And it surely is the purest fiction to suggest that other

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[9] The two statements described the composition standards and the pricing/pooling requirements *separately*; neither statement suggested that one provision was dependent on the other, and neither so much as hinted, as the court of appeals would have it, that the pricing and pooling scheme was "a means of effecting California's milk composition standards." App., *infra*, 10a. See *Hearings* 435-436 (statement for the record of Rep. Bill Thomas); *id.* at 480-480 (statement of Craig Alexander); *id.* at 567-568 (written testimony of Craig Alexander).

members of Congress had *any* notion of what was said at that hearing — let alone that those statements put members on actual notice that Section 144 validated discriminatory state pricing and pooling regulations that were not referenced in the text of the federal statute. Whether or not legislative history of this sort may be used to establish the meaning of legislation in other settings,[10] it is entitled to no weight in circumstances where a clear statement of congressional intent is required. The court of appeals' contrary holding here renders wholly nugatory "[t]he requirement that Congress affirmatively contemplate otherwise invalid state legislation," as well as the concomitant rule that there must be, "in fact, * * * a collective [congressional] decision." *South-Central Timber*, 467 U.S. at 91, 92.[11]

It should be added that the dangers posed by the lax Commerce Clause standard endorsed by the court of appeals

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[10] Actually, the sort of legislative history evidence relied upon by the panel here — statements by interested parties at congressional hearings held outside of Washington — is so thin as to be practically translucent. See generally *Garcia* v. *United States*, 469 U.S. 70, 76 (1984); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395-396 (1951) (Jackson, J., concurring).

[11] For this reason, the court of appeals' reference to petitioners' supposed "concession during oral argument that the pricing and pooling laws were adopted in order to assist milk producers in complying with the milk content provisions" (App., *infra*, 10a) is beside the point. The State's intent in enacting its restriction on interstate commerce has no bearing here; the relevant question is whether Congress affirmatively intended to authorize this sort of state regulation. As Congress was unaware of the asserted connection between the composition and pricing/pooling requirements, it hardly could have given the requisite affirmative consideration to the question whether the State should be authorized to enact the latter set of restrictions.

are especially acute when, as is true in this case, a State seeks actually to *discriminate* against foreign businesses. California has established a regime that makes it prohibitively expensive for out-of-state companies to sell their milk in California, while subsidizing in-state milk processors so that they may overcome the state-imposed burden, thus keeping an overwhelming share of the market for domestic producers. In the absence of congressional authorization, this sort of discriminatory scheme "invokes the strictest scrutiny." *Hughes*, 441 U.S. at 337. Accord, *e.g.*, *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 511 U.S. 93, 101 (1994); *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 342-343 (1992). It makes little sense to hold that a state may impose precisely the same system of discrimination by pointing to the sort of flimsy evidence of congressional intent cited by the Ninth Circuit here.

3. As might be expected, the Ninth Circuit's holding cannot be reconciled with the approach taken by other courts of appeals. In circumstances quite similar to those here, for example, the First Circuit rejected Puerto Rico's argument that Congress had lifted dormant Commerce Clause restrictions so as to permit the Commonwealth to require identification of the State of origin of eggs imported from the mainland. *United Egg Producers* v. *Department of Agric. of the Commonwealth of Puerto Rico*, 77 F.3d 567 (1st Cir. 1996). Puerto Rico relied on the Egg Products Inspection Act ("EPIA"), which provides that "no State or local jurisdiction *other than those in noncontiguous areas of the United States* may require labeling to show the State or other geographical area of production or origin." 21 U.S.C. § 1052(b)(2) (emphasis added). Puerto Rico argued that the italicized language authorized it to impose an egg labeling requirement and therefore overrode the dormant Commerce Clause.

The First Circuit disagreed. It began by noting that "[t]he standard for finding Congressional consent is * * * high. Congressional consent to otherwise impermissible state

regulation must be either 'expressly stated,' * * * or 'made unmistakably clear[.]' * * * The state or local jurisdiction * * * has the burden of demonstrating Congress' unmistakably clear intent to allow otherwise discriminatory regulations." *United Egg Producers*, 77 F.3d at 570 (quoting *Sporhase*, 458 U.S. at 960, and *South-Central Timber*, 467 U.S. at 91). The court then held that this standard was not satisfied because the EPIA

> did not state affirmatively that noncontiguous jurisdictions could "require labeling to show the State or other geographical area of production or origin." * * * Read literally, [the EPIA] can be said to go no further than to exempt Puerto Rico from Congress' own egg-labeling ban. The exemption is consistent with intending to allow Puerto Rico to adopt only egg-labeling requirements that do not otherwise violate the Dormant Commerce Clause * * *.

Ibid. (citations omitted).[12]

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[12] The court of appeals attempted to distinguish *United Egg* on the ground that the First Circuit "stated that the legislative history [of the EPIA] was silent as to whether Congress intended for the exemption to insulate egg laws from Commerce Clause limitations." App., *infra*, 9a. But that observation is beside the point; even if legislative history were relevant to the inquiry here, there is absolutely *no* legislative history suggesting that Section 144 was in fact directed at Commerce Clause requirements. The court below also opined that *United Egg* is distinguishable because the EPIA "purported to insulate egg labeling laws only from the ban contained in the very same statute; it did not insulate egg labeling from any other provision of law." *Ibid.* The First Circuit, however, expressly observed that the EPIA "exemption is perhaps susceptible to a reading going beyond the above. One can argue that as Congress had before it the whole subject of egg labeling, its exemption of noncontiguous jurisdictions must be understood to signify, by implication, Congressional approval of any and all egg-

Precisely the same thing is true here: Section 144 does not contain "an affirmatively stated grant of permission" authorizing California to disregard the Commerce Clause (77 F.3d at 571), and is "consistent with intending to allow [California] to adopt only [milk composition] requirements that do not otherwise violate the Dormant Commerce Clause." *Id.* at 570. Had it applied the Third Circuit's approach, the Ninth Circuit in this case therefore would not have "conclude[d] that [California] met [its] burden of showing that Congress' intent * * * was 'unmistakably clear.'" *Id.* at 571 (citation omitted).[13]

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labeling requirements." 77 F.3d at 570. But the First Circuit declined to indulge in such a reading absent "an *affirmatively stated grant of permission*" to Puerto Rico "to require egg-labeling." *Id.* at 571 (emphasis added). The Ninth Circuit disregarded that principle here.

[13] Other courts of appeals also have insisted on considerably more clarity from Congress than the Ninth Circuit found adequate here. See, *e.g.*, *United States* v. *Taylor*, 752 F.2d 757, 763 (1st Cir. 1985) (a passage in the legislative history that "arguably denotes congressional consent" not sufficient to establish requisite "clear congressional intent"), aff'd in relevant part, 477 U.S. 131 (1986); *Norfolk S. Corp.* v. *Oberly*, 822 F.2d 388, 396 n.12 (3d Cir. 1987) ("evidence that Congress was informed about [a state law restricting interstate commerce] does not plainly establish that Congress intended to authorize any constitutionally invalid elements in that law. The plain authorization requirement is designed to prevent the courts from engaging in 'mere speculation as to what Congress "probably had in mind."'") (quoting *New England Power*, 455 U.S. at 343); *Environmental Technology Council* v. *Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996), cert. denied, 117 S. Ct. 2478 (1997) (citing Justice O'Connor's concurring opinion in *C&A Carbone* that "emphasiz[es] high degree of specificity with which Congress must 'explicitly' authorize state law otherwise violating the Commerce Clause"); *Chemical Waste Management, Inc.* v. *Templet*, 967 F.2d 1058, 1059 (5th Cir. 1992) (State "failed

C. The Ninth Circuit's Holding Will Impede Interstate Commerce And Foment Tension Between The States

For the reasons explained above, review is warranted because the decision below departs from this Court's precedents and may lead other courts into error when they address the claim that Congress authorized state restrictions on interstate commerce. But even apart from that question of constitutional doctrine, a grant of certiorari also is necessary because the Ninth Circuit gave a patently incorrect answer to a question of great practical importance. This Court historically has been vigilant in guarding against restrictive state laws that reflect the "'tendencies toward economic Balkanization'" that the Commerce Clause was intended to combat (*Oregon Waste Systems*, 511 U.S. at 98 (citation omitted)) — and it has stepped in repeatedly when States have impeded interstate commerce in an "attempt[] to protect [their] dairy farmers." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 193 (1994). See, *e.g.*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). That vigilance is essential to "effectuate[] the Framers' purpose to 'prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders.'" *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 330 (1996) (citation omitted). Here, the court of appeals' disregard for the "clear statement" requirement led it to uphold a state law that disrupts commerce, interferes with interstate competition, and exacerbates friction between the States.

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to present evidence 'indicat[ing] an unmistakably clear congressional intent to permit states to burden interstate commerce'") (citation omitted).

As we have explained, the California system makes it effectively impossible for out-of-state companies to sell their milk in California on a competitive basis. Indeed, the effect of the state regime was candidly described by an official of the California dairy industry in the very congressional hearing excerpt cited by the court below; he complained that, in the period between 1990 and 1996 when the California standards were preempted by the NLEA, "some California fluid processors * * * lost business to out-of-state competitors with lower cost Federal solids milk products." *Hearings* 482 (statement of Craig Alexander, executive director of the Dairy Institute of California). As matters now stand, the California scheme produces a captive market that is reserved for in-state producers, with only one per cent of California's milk coming from out-of-state sources. See *id.* at 435 (statement for the record of Rep. Thomas). This regime disadvantages competitors across the Nation, as well as the tens of millions of California consumers who are denied access to lower-cost out-of-state products.[14]

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[14] At the same time, the Ninth Circuit's decision also has serious implications for the trade and foreign policies of the United States. The United States is party to international agreements that limit participating nations' ability to impose non-tariff barriers on food imports relating to processing and production methods, packaging, labeling, and other requirements that concern pubic health and safety (so-called "sanitary and phytosanitary" measures). See 63 Fed. Reg. 28966 (May 27, 1998); 62 Fed. Reg. 64618 (Dec. 8, 1997); 62 Fed. Reg. 36243 (July 7, 1997); 61 Fed. Reg. 47453 (Sep. 9, 1996); 60 Fed. Reg. 67492 (Dec. 29, 1995); 58 Fed. Reg. 2431 (Jan. 6, 1993); T. Josling, S. Tingermann, & T.K. Warley, AGRICULTURE IN THE GATT 208-213 (1996); LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION 18-19 (J. Dennin, ed., 1995). But the Ninth Circuit's broad reading of Section 144 seemingly exempts California's identity standards from these trade agreements (which fall within the court's broad understanding of "other provision[s] of law" every bit as much as does the

At the same time, California's restrictive system is "'destructive to the harmony of the States.'" *Camps Newfound/Owatonna* v. *Town of Harrison*, 117 S. Ct. 1590, 1595 (1997) (citation omitted). Restrictions imposed by one State on out-of-state products invariably motivate the disadvantaged States to impose restrictions of their own, leading to interstate disputes and (insofar as these restrictions themselves survive constitutional challenge) to the multiplication of trade barriers that diminish the national market. Given the sensitivity and importance of this problem, the decision that Congress abrogated the requirements of the Commerce Clause should be made, if at all, by this Court.

Commerce Clause), calling into question the efficacy in California of international commitments to eliminate discriminatory trade policies. Similarly, in November 1997 the United States filed a complaint with the World Trade Organization, arguing that Canada's two-tier dairy pricing and pooling scheme violates Articles 9 and 10 of the GATT Uruguay Round Agreements as an impermissible export subsidy scheme. See U.S. International Trade Commission, *The Year in Trade* 85-89. In its response, Canada observed that California's system provides for the same sort of two-tier pricing. *Canada - Measures Affecting the Exportation of Dairy Products and the Importation of Milk*, First Submission of Canada to the WTO 48 (Oct. 6, 1998) ("The use of differing prices for export sales of dairy products is also part of the marketing system used in California."). The Ninth Circuit's expansive holding that Congress meant to validate California's pricing and pooling scheme notwithstanding contrary requirements of federal law apparently imputes to Congress an intent to authorize a significant conflict with United States treaty obligations even as the United States is insisting that other countries dismantle their programs of export subsidies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1998

APPENDIX

APPENDIX A

SHAMROCK FARMS COMPANY AND
SHAMROCK FOODS COMPANY, PLAINTIFFS-APPELLANTS,

v.

ANN M. VENEMAN, SECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA, RICHARD TATE, CHIEF, MILK AND DAIRY FOODS CONTROL BRANCH, DIVISION OF ANIMAL INDUSTRY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA, DEFENDANTS-APPELLEES.

No. 97-15428.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 11, 1998.

Decided July 2, 1998.

John H. Vetne, Blodgett, Makechnie & Vetne, Newburyport, Massachusetts, for plaintiffs-appellants.

Mark J. Urban, Deputy Attorney General of the State of California, Sacramento, California, Leonard R. Stein and Eugene M. Pak, Steefel, Levitt & Weiss, San Francisco, California, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California; Lawrence K. Karlton, District Judge, Presiding. D.C. No. CV-96-00889-LKK.

Before: D.W. NELSON, BOOCHEVER, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Shamrock Farms operates a dairy farm in Arizona and sells the raw milk it produces to Shamrock Foods, a milk processor also located in Arizona. Shamrock Foods distributes packaged fluid milk products to a number of western states, including California. Together, Shamrock Farms and Shamrock Foods (collectively "Shamrock") filed suit against the state of California in federal district court alleging that various California laws and regulations

governing the sale of milk products in that state violate the Commerce Clause. Shamrock asserts that the California provisions effectively prohibit out-of-state milk producers from selling their products in that state and impose an undue burden on interstate commerce. The district court dismissed Shamrock's claims pursuant to Fed. R. Civ. P. 12(b)(6), holding that a federal statute clearly authorizes California's laws and regulations and insulates them from Commerce Clause challenges.

BACKGROUND

At issue in this case are various California regulations that govern the composition of consumer milk, in particular, those governing the content of both milkfat and solids-not-fat ("SNF"), as well as various California laws that govern milk pricing and pooling. The term "SNF" simply refers to solids (other than milkfat) naturally found in raw milk, which contain nutrients such as protein and calcium. The fat and SNF content of milk varies from "breed to breed, region to region, season to season, plant to plant, and farm to farm." It is possible to increase or standardize the natural SNF content of milk by adding a fortifying agent such as milk powder or condensed milk. When the SNF content is increased, the nutritional value of the milk increases as well.

Milk produced and distributed by Shamrock is subject to regulation by various federal agencies, including the Department of Agriculture, the Food and Drug Administration ("FDA"), and the Department of Health and Human Services ("HHS"). Pursuant to the Food, Drug and Cosmetic Act, the FDA and HHS have adopted standards of identity with respect to the milkfat and SNF content of milk sold in Shamrock's geographic region. 21 U.S.C. § 341. These federal identity standards, which are designed to inform consumers about the content of the milk they purchase and to protect against fraud and misrepresentation, require all milk (whether whole milk, lowfat milk, or skim milk) to be not less than 8.25% SNF. This percentage roughly reflects the average natural SNF content of all raw milk.

The state of California has adopted higher identity standards for milk sold within its borders. In order for milk processors to comply with California's compositional standards, they must fortify most of their milk by adding condensed milk or milk powder.

Because Shamrock does not fortify, standardize, or otherwise increase the SNF content of its milk, it is effectively prohibited from selling whole and skim milk in California during certain seasons of the year. California's standards also effectively prohibit Shamrock from distributing its lowfat milk during the entire year.

In addition to regulating the composition of milk, California has also adopted milk pricing and pooling laws, which are designed to regulate and stabilize the state's milk market. Under these laws, all milk produced in California is pooled, and the state then sets minimum prices that California processors must pay individual California producers for the share of the raw milk they have supplied. These prices are based in part on the SNF content — the lower the SNF content, the lower the price. California also provides its milk processors with a fortification allowance, which reduces the cost of standardizing the milk. Shamrock asserts that California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors.

Shamrock filed a complaint alleging that California's application of its milk composition standards and its pricing and pooling laws violates the Commerce Clause and the Fourteenth Amendment. Shamrock sought declaratory and injunctive relief, seeking to stop the state from enforcing its standards. California promptly moved to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and the district court granted the motion. Shamrock moved for reconsideration of the dismissal order, which the district court denied. Shamrock appeals.

DISCUSSION

I. COMMERCE CLAUSE

Shamrock asserts that California's milk composition standards and pricing and pooling laws are violative of the Commerce Clause because they prohibit the free flow of milk products across state lines. Assuming that the facts alleged in the complaint are true, as we must when considering an appeal from a dismissal under 12(b)(6), we consider whether the district court correctly concluded that the laws and regulations at issue are exempt from challenge under the Commerce Clause. A dismissal under Rule 12(b)(6) is

reviewed de novo. *See Cohen* v. *Stratosphere Corp.*, 115 F.3d 695, 700 (9th Cir.1997).

In addition to being an affirmative grant of congressional authority, the Commerce Clause, which authorizes Congress "[t]o regulate Commerce . . . among the several states," U.S. Const. art. I, § 8, cl. 3, is in its negative aspect also a limitation on the regulatory authority of the states. *See Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824) (Marshall, C.J.). Thus, although a state has power to regulate commercial matters of local concern, a state's regulations violate the Commerce Clause if they are discriminatory in nature or impose an undue burden on interstate commerce, either because they are not necessary to further the state's legitimate interests or because they "unreasonably favor[ ] local producers at the expense of competitors from other States." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 154, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) (citations omitted). If a state's laws are found to be nothing more than "economic protectionism" in disguise, they will be invalidated as a matter of course. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). Even laws that are applied evenhandedly and impose only an incidental burden on interstate commerce can be unconstitutional if the burden on commerce is "'excessive in relation to the putative local benefits.' " *Id.* (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

Notwithstanding these limitations on permissible state action, Congress has the authority to immunize state laws from Commerce Clause challenges. *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 653, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981); *see also White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983) (noting that if state regulation is "specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce"). In this case, California maintains that Congress insulated its milk laws and regulations from Commerce Clause challenges by enacting § 144 of the Federal Agriculture Improvement and Reform Act of 1996 (the "Farm Bill"). See Pub. L. No. 104-127, 110 Stat. 888 (1996). Accordingly, argues California, there is no need to assess the

validity of its laws and regulations by determining whether the burden on commerce is justified in relation to the state's interest. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). If California's contention is correct and Congress has afforded its milk laws and regulations the protection it claims, there can be no merit to Shamrock's Commerce Clause argument. Our analysis thus turns on whether Congress has indeed authorized California to adopt and enforce its regulatory scheme regardless of the effect it may have on interstate commerce.

In 1990, Congress enacted the Nutritional Labeling and Education Act of 1990 ("NLEA"), a provision of which prohibits states from independently setting quality standards for foods that move in interstate commerce. Under the NLEA, however, the FDA has the authority to exempt certain state food standards from the NLEA's general preemptive effect. 21 U.S.C. § 343-1(b). After the NLEA was passed, California petitioned the FDA for authorization to maintain its stringent standards for fluid milks. Before California received FDA approval, Congress passed the Farm Bill. Included in the Farm Bill is a provision that specifically applies to California's milk standards and eliminates the need for the state to obtain an exemption:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding:
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

7 U.S.C. § 7254 (emphasis added).

California's milk standards and its pricing and pooling laws constitute an integrally related scheme. Because § 144 of the Farm Bill specifically refers only to the milk standards, we will discuss its effect on that part of the scheme first and then discuss its effect on the pricing and pooling laws.

A.

It is evident that Congress intended to insulate California's milk standards from federal regulation, including under the NLEA: The statute clearly states that nothing in the Farm Bill "or any other provision of law" shall interfere with California's efforts to regulate the SNF content of milk sold within its borders. Shamrock argues, however, that although the statute may be clear with respect to insulating the regulations from preemption or prohibition under federal regulation, it is ambiguous with respect to whether it insulates California's regulations from challenges under the Commerce Clause. *See Wyoming* v. *Oklahoma*, 502 U.S. 437, 439, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992) (construing the Federal Power Act as insulating state laws from preemption, but not from the Commerce Clause).

As the Supreme Court has explained, if Congress intends to authorize state laws that violate the Commerce Clause, its intent must be manifest. "Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause." *C & A Carbone, Inc.* v. *Town of Clarkston*, 511 U.S. 383, 408, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (O'Connor, J., concurring) (quoting *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 91, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984)). The requisite intent may be gleaned both from the language of the relevant statute and from the legislative history. *See Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982).

In light of the breadth of the language contained in the statute, we conclude that the state has met its burden of establishing that Congress intended to protect the milk standards from Commerce Clause limitations. Shamrock argues that the language "any other provision of law" is not broad enough to include the Commerce Clause. We disagree. We hold that by using the expression "any other provision of law" in the context it did here, Congress demonstrated its intent to encompass all law, whether it be statutory law, common law, or constitutional law.

If Congress had wanted to protect California's milk standards only against the proscriptions of federal statutes and regulations, it

could easily have chosen to use narrower language, such as "any federal law or regulation." This phrase plainly refers to statutory enactments, their implementing rules and regulations, and probably even to decisional law. It is the type of phrase Congress used later in the same paragraph of the Farm Bill when, in referring to the means of establishing California's milk standards, it specifically referred to "any law, regulation, or requirement." By contrast, a general reference to any or all "law" connotes a much broader concept. *See* BRYAN A. GARNER, *A Dictionary of Modern Legal Usage* 503 (2d ed.1995) (noting that "a law" refers to "a particular and concrete instance of a legal precept," whereas "the law" describes "something much broader and more general"); "any other provision of law" is closer to "the law" than to "a law."

We are aware of no authority that would permit us to conclude that the Commerce Clause, or, for that matter, the Full Faith and Credit Clause, or the provision of the Twenty-Second Amendment to the Constitution that prohibits the election of any person to the Office of President more than twice, do not constitute "provisions of law." While neither the Constitution nor any individual article or amendment may be "a law," constitutional provisions are in ordinary English usage "provisions of law." That the Constitution is part of the law of this nation would seem to be beyond dispute.

We note also that the protection the Farm Bill affords California's milk standards is sweeping. It does not simply bar preemption. Rather, it states that no provision of law shall "preempt, prohibit, or otherwise limit" California's milk laws or regulations. The breadth of the Farm Bill's protection for California's milk standards fortifies our view that by using the term "any other provision of law," Congress intended to preserve those standards from any sort of challenge, including one based on Commerce Clause grounds.

Shamrock asserts that *Wyoming* v. *Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992), and *United Egg Producers* v. *Department of Agric.*, 77 F.3d 567 (1st Cir.1996), support its contention that while such a conclusion may indeed be possible, it is not consistent with the Supreme Court's jurisprudence in this area. We do not agree that either *Wyoming* v. *Oklahoma* or *United Egg* is of any assistance to Shamrock. In *Wyoming* v. *Oklahoma*,

the issue was whether the so-called "saving clause" in the Federal Power Act,[1] which allowed states to regulate local electric power rates notwithstanding federal regulation over the electric power industry, also permitted Oklahoma to stabilize its rates by enacting discriminatory legislation. The Supreme Court struck down the state laws, finding that Congress had not evinced a clear intent to immunize all state laws related to power-rate regulation even when such laws interfered with interstate commerce. From the language of the statute ("lawful authority now exercised"), the Court reasoned that Congress merely intended to maintain the *status quo*, to preserve regulations that were lawful under the dormant Commerce Clause limitations on state regulation. 502 U.S. at 458, 112 S.Ct. 789. In other words, Congress intended to permit the states to carry on any and all activities in which they were lawfully engaged at the time of the passage of the act. If any of the state activities were unlawful at that time, either because they were in violation of some federal statute or in violation of the Constitution, the Act did not purport to make them lawful. Thus, the Federal Power Act preserved lawful state regulations and exempted them from preemption under that particular Act.

By contrast, the statutory language in the Farm Bill creates a blanket exclusion for California's milk standards, not just those considered to be "lawful" at the time of the bill's enactment. Moreover, the Farm Bill insulates those standards from "any provision of law" that may "otherwise limit" California's authority to maintain them, and not just from the provisions of the Farm Bill itself. Accordingly, *Wyoming* is clearly distinguishable from this case.

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[1] The saving clause provided as follows:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but ... shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

16 U.S.C. § 824(b)(1).

In *United Egg*, the First Circuit recently considered a Commerce Clause challenge to a Puerto Rican law that required all eggs imported into the commonwealth to bear a stamp indicating the state of origin. Puerto Rico argued that its egg regulations were authorized by Congress, relying on the Egg Products Inspection Act. 21 U.S.C. § 1052(b)(2). That Act provided:

> [N]o State or local jurisdiction other than those in noncontiguous areas of the United States may require labeling to show the State or other geographical area of production or origin.

77 F.3d at 569. The First Circuit rejected Puerto Rico's argument that this exemption signified "approval of any and all egg-labeling requirements in those places regardless whether justified or unjustified by Dormant Commerce Clause considerations." *Id.* Instead it concluded that "Congress excepted ... Puerto Rico from the blanket prohibition it was placing upon egg-labeling in all other places." *Id.* The statute thus purported to insulate egg labeling laws only from the ban contained in the very same statute; it did not insulate egg labeling from any other provision of law. Additionally, the court stated that the legislative history was silent as to whether Congress intended for the exemption to insulate egg laws from Commerce Clause limitations. Accordingly, the court was unwilling to read the statute as broadly as Puerto Rico urged.

In this case, the relevant statutory language is of a wholly different character than the language in the egg labeling ban and the language of the statute in *Wyoming*, both of which protected state laws from being declared illegal under those particular statutes, and no more. Here, Congress was unmistakably clear in exempting California's milk standards from all provisions of law, wherever situated, not from coverage under a single statute.

B.

Having determined that the milk compositional standards are immune from Commerce Clause challenge, we now turn to the pricing and pooling laws. Although § 144 of the Farm Bill does not specifically refer to these laws, as it does to the milk composition standards, we conclude that the pricing and pooling provisions fall under the ambit of the prohibition against indirect limitations on

laws, regulations, or requirements regarding milk standards. As we have noted, the various elements of the milk fortification scheme are interrelated and mutually interdependent. The pricing and pooling provisions are, in short, an essential part of California's plan to maintain its milk composition standards.

Our task in this respect is made somewhat less difficult by Shamrock's concession during oral argument that the pricing and pooling laws were adopted in order to assist milk producers in complying with the milk content provisions. This concession is amply supported by the legislative history surrounding the passage of § 144 of the Farm Bill, which demonstrates that Congress intended that the milk pricing and pooling scheme be included in the exemption as a means of effecting California's milk composition standards.[2] *See Hearings Before the Subcomm. on Livestock, Dairy and Poultry*, 104th Cong., Apr. 20, 1995 (statement of Hon. Bill Thomas) (explaining that the success of California's milk standards is attributable to the state's pricing system); *see also id.* (statement of Craig S. Alexander, Dairy Institute of California) (discussing California's pricing and pooling system in the context of California's milk quality standards). From all accounts, the milk pricing and pooling laws were considered by all concerned to be an important element of California's milk regulation scheme. Further, the pricing and pooling laws themselves state expressly that their purpose is to ensure that milk with the state-mandated SNF content is readily available to Californians. *See* Cal. Food & Agr. Code § 61802(c) (determining that the pricing and pooling regulations are necessary to prevent economic disruption that could undermine the "standards of content and purity").

Accordingly, we conclude that California's milk pricing and pooling laws are also exempted from Commerce Clause challenge.

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[2] The district court refused to look at legislative history because it determined that the statute was clear on its face. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (admonishing courts to give effect to the plain meaning of statutes). Because the pricing and pooling laws are not specifically referenced in the statute, however, it is important to consider the legislative history here.

II. FOURTEENTH AMENDMENT

In its complaint, Shamrock generally invoked the Fourteenth Amendment and now alleges that California's milk-related laws are prohibited under both the Equal Protection and Due Process Clauses. Although it is not clear that Shamrock raised these two provisions of law specifically in the district court, because the arguments are purely legal in nature, we may consider them here.

In assessing whether the state s laws and regulations violate the Equal Protection Clause, we apply the rational basis test. *See Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). Shamrock contends that California has no legitimate interest in requiring milk to have a certain level of SNF or in establishing pricing and pooling laws. We do not agree. It is evident that the state's purposes in enacting both the milk composition standards and the pricing and pooling laws are legitimate. Specifically, California's milk laws and regulations further the state's interests in maintaining a stable and plentiful supply of wholesome milk. *See* Cal. Food & Agr. Code §§ 61801, 61802. We have already recognized the legitimacy of these interests in *Country Classic Dairies, Inc.* v. *Montana, Dept. of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir.1988) (upholding Montana's milk laws against an equal protection challenge).

Because California's interests in enacting the milk laws and regulations are legitimate, Shamrock must allege facts in the complaint to show that those laws and regulations are arbitrary or not rationally related to the state's goals in order to withstand the state's motion to dismiss. Even assuming that the facts alleged in the complaint are true, Shamrock has simply failed to set forth facts that would support an equal protection violation. There is nothing in the complaint that so much as suggests that the milk laws are either arbitrary or unrelated to the state's efforts to ensure a plentiful supply of healthy milk for its citizens. It is insufficient to assert that the milk laws establish discriminatory classifications; the complaint must also allege facts to demonstrate that the classifications are arbitrary or that they are not rationally related to legitimate state interests.

Likewise, there is no merit to Shamrock's contention that a due process violation could be found under the facts alleged in the complaint. As with equal protection, rationality is the touchstone of due process analysis in cases of the type before us. Nothing in Shamrock's complaint suggests arbitrariness or a lack of rationality.

CONCLUSION

Congress has insulated California's milk laws against Commerce Clause challenges, and the district court therefore properly dismissed Shamrock's claims pursuant to Rule 12(b)(6). We also conclude that there is no merit to Shamrock's other constitutional challenges, and that dismissal as to these claims was appropriate as well.

AFFIRMED.

APPENDIX B

SHAMROCK FARMS COMPANY
AND SHAMROCK FOODS COMPANY, PLAINTIFFS,

v.

ANN M. VENEMAN, SECRETARY, DEPARTMENT OF
FOOD & AGRICULTURE, STATE OF CALIFORNIA, ET AL.,
DEFENDANTS.

No. Civ. 96-CV-889 LKK.

United States District Court, E.D. California.

Sept. 25, 1996.

John Anthony Mendez, DeCuir and Somach, Sacramento, CA.

John H. Vetne, Pro Hac Vice, Law Offices of John H. Vetne, Newburyport, MA.

Leonard R. Stein, Steefel Levitt and Weiss, San Francisco, CA.

Mark Joseph Urban, Attorney General's Office of the State of California, Sacramento, CA.

ORDER

KARLTON, Chief Judge Emeritus.

This case is before me on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Based upon the papers and pleadings on file herein, and oral argument heard by the court on September 3, 1996, the court disposes of the matter herein. *See* Local Rule 230(h).

I.

THE CASE

Plaintiffs are an Arizona dairy farm ("Shamrock Farms") and an Arizona milk processor ("Shamrock Foods") which distributes milk for sale in a number of western states, including California. Plaintiffs challenge California's standards for milkfat and solids-not-fat ("SNF") content of milk distributed in California, as well

as California's pricing and pooling laws for milk bought from California farmers.

According to the complaint, the milk distributed by Shamrock Foods is subject to raw milk price and fluid milk identity regulation by the United States Department of Agriculture. Pursuant to section 401 of the Food Drug and Cosmetic Act, 21 U.S.C. § 341, the Department of Health and Human Services has adopted standards for milkfat and SNF content for milk sold in plaintiffs' geographic region. California has adopted different compositional standards for milk sold in California. Plaintiffs aver that processors must fortify their milk in order to bring it in compliance with California's standards. Plaintiffs also claim that they cannot sell their milk in California because they do not add milk powder or condensed milk to fortify, standardize or otherwise increase SNF content of the milk.

In addition, plaintiffs allege that the milk standards are "inextricably related to state milk pricing and pooling laws." See Complaint at ¶ 28. In this regard, the complaint explains that California sets reduced prices for California milk with low SNF content, and then provides California milk processors with a fortification allowance to standardize their milk with wet or dry solids. According to plaintiffs, this provides California processors with a competitive advantage against out-of-state processors because California does not provide out-of-state processors with a fortification allowance.

On June 5, 1995, in a prior action brought by plaintiffs against the above- captioned defendants, Judge David F. Levi of this court ruled that the Nutritional Labeling and Education Act of 1990 ("NLEA") preempted California's compositional standards.[1] He

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[1] NLEA, § 403A(a) of the Federal Food Drug and Cosmetic Act, 21 U.S.C. § 343-1(a), provides:

> § 343-1. National uniform nutrition labeling; preemption (a) Except as provided in subsection (b), no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce — (1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such

ordered that "[u]ntil such time as the FDA may issue an exemption from federal milk identity standards . . . California milk identity standards not identical to federal standards are preempted . . . ." On April 4, 1996, the President signed into law the Federal Agricultural Improvements and Reform Act of 1996 ("FAIRA").[2]

On April 26, 1996, defendants informed Shamrock Foods that all processing and marketing of milk within California would be subject to California standards whether or not it is produced and processed within the state. On May 3, 1996, plaintiffs filed this complaint for declaratory and injunctive relief on the basis that the milk standards, as construed and applied by defendants, violate the Commerce Clause and the Fourteenth Amendment to the United States Constitution.

II.

DISMISSAL STANDARDS UNDER FED. R. CIV. P. 12(b)(6)

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See Cruz* v. *Beto*, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference that can be drawn from the "well-pleaded"

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standard of identity or that is not identical to the requirement of section 341(g) of this title.

[2] Title I of the Act, the Agricultural Market Transition Act, at section 144, provides:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding:
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> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat."

110 Stat. 888, 917 (1996), Pub. L. No. 104-127, Subtitle D, Chapter 1, § 144.

allegations of the complaint. *See Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO* v. *Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. *See Id*; *see also Wheeldin* v. *Wheeler*, 373 U.S. 647, 648 (1963) (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *See Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the ... laws in ways that have not been alleged." *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

III.

THE COMMERCE CLAUSE

It is well established that Congress can authorize a state to pass legislation burdening interstate commerce if it makes its intent to do so clear. *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 174 (1985)("When Congress so chooses, state actions which it plainly authorizes are invulnerable to a constitutional attack under the Commerce Clause."); *W. & S. Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 652-53 (1981)("If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the Congressional authority is rendered invulnerable to Commerce Clause challenge."); *White* v. *Mass. Council of Const. Employers, Inc.*, 460 U.S. 204, 213 (1983)("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce."). Nonetheless, plaintiffs argue that Section 144 of the Agricultural

Market Transition Act does not clearly allow California to regulate the composition of milk marketed in California. I cannot agree.

Section 144 clearly authorizes California to enforce its compositional standards for milk on out of state processors. First, the statute specifically refers to California and its ability to regulate the percentage of SNF in milk sold in California. Second, under the statute no provision of law shall preempt or otherwise limit California's ability to do so. Obviously the NLEA is a "provision of law," and thus, under the plain terms of section 144, NLEA no longer preempts the compositional standards for milk in California. Accordingly, California's enforcement of its standards relative to plaintiffs does not violate the Commerce Clause.

In addition to challenging the compositional standards, plaintiffs argue that the milk price and pooling laws — in conjunction with the standards — violate the Commerce Clause. Again, the court must reject plaintiffs' contention that Section 144 does not clearly provide California with the authority to impose its pricing and pooling laws upon out of state processors. Congress specifically provided California with the authority to regulate, "directly or indirectly," the compositional standards of milk marketed in California. Plaintiffs do not argue that the price and pooling scheme is not an indirect means for enforcing compositional standards, nor would such an argument be credible. Thus, whatever discriminatory effect on interstate commerce the pricing and pooling scheme might have, it does not violate the Commerce Clause because Congress has approved of it.

IV.

SEPARATION OF POWERS

Plaintiffs also maintain that the enactment of Section 144 violates the separation of powers doctrine. In this regard, they contend that section 144 cannot remove the preemptive force of NLEA because Congress cannot overturn Judge Levi's interpretation of the NLEA without amending the NLEA itself. This argument has no merit.

Congress can amend or repeal any law, even for the purpose of ending pending litigation. *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855).

While the legislative branch cannot prescribe a rule of decision in a case pending before the courts, *see United States* v. *Sioux Nations of Indians*, 448 U.S. 371, 405 (1980)(citing *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871)), Congress can change the law at any time through superseding legislation so long as it does not direct the court how to interpret the law. *See, e.g.*, *Stop H-3 Ass'n* v. *Dole*, 870 F.2d 1419, 1434 (9th Cir. 1989). Here, Congress has not altered Judge Levi's interpretation of the NLEA; rather, Congress modified the NLEA after Judge Levi interpreted it.

Plaintiffs' reliance on *Seattle Audobon Society* v. *Robertson*, 914 F.2d 1311 (9th Cir. 1990), in their separation of powers argument is unavailing. There, a temporary environmental law, the Northwest Timber Compromise, specifically provided that the defendants in two pending cases would not be in violation of the already existing requirements for the management of timber lands if they complied with the new requirements set forth in the Compromise. The Ninth Circuit held that the Compromise violated the separation of powers doctrine because it "direct[ed] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." *Id.* at 1316.

Reliance is unavailing first and foremost because the circuit's decision was reversed by the Supreme Court. *See Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). In doing so, the High Court explained that even though the law specifically made reference to pending cases, it did not abrogate the judiciary's role of determining whether defendants complied with the statute, either through compliance with the new requirements or through compliance with the old requirements. The Court concluded: "[t]o the extent that subsection (b)(6)(A) affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases." *Id.* at 440.

As explained above, section 144 clearly modifies the NLEA. Moreover, there can be no threat that the statute prescribes a rule of decision in a pending case because Judge Levi's case was disposed of on summary judgment. Indeed, the legislation is consistent with Judge Levi's observation that the NLEA would

preempt California regulation until the FDA issued an exemption. In sum, Judge Levi's holding that NLEA preempted state compositional standards did not prohibit Congress from enacting legislation which altered the NLEA's effect.

V.

EQUAL PROTECTION

Plaintiffs' Equal Protection argument fairs no better than their challenge under the Commerce Clause. Since California's regulation of milk standards and prices creates an economic classification, plaintiffs must allege that the milk standards and pricing scheme are not rationally related to a legitimate governmental interest in order to state an Equal Protection claim. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

California's twin interests justifying its regulation are health and stabilization to the milk market. *See* Cal. Food & Agr. Code §§ 61801, 61802.[3] These are legitimate interests for purposes of the Equal Protection Clause. *Country Classic Dairies, Inc.* v. *Milk Control Bureau*, 847 F.2d 593, 596 (1988). Thus, California does not run afoul of the Equal Protection Clause so long as the "[l]egislature could rationally have decided" that its compositional and pricing standards might have furthered the health, safety and market stabilization goals for which it purportedly enacted the legislation. See *Id.* Plaintiffs do not allege that the statute is irrational, nor would such an allegation be well-taken. Thus, plaintiffs' Equal Protection challenge cannot lie.

VI.

ORDER

For all the above reasons, the court makes the following ORDERS:

1. Defendants' motion to dismiss is GRANTED; and

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[3] On a motion to dismiss, the court may take judicial notice and consider the language and legislative history of a statute. See *MGIC Indem. Corp.* v. *Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

2. The Status Conference set for September 23, 1996, is VACATED.

IT IS SO ORDERED.

DATED: September 20, 1996

/s/ LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

APPENDIX C

SHAMROCK FARMS COMPANY AND
SHAMROCK FOODS COMPANY, PLAINTIFFS-APPELLANTS,

v.

ANN M. VENEMAN, SECRETARY, DEPARTMENT
OF FOOD & AGRICULTURE, STATE OF
CALIFORNIA, ET AL., DEFENDANTS.

No. Civ. S-96-889.

United States Court of Appeals,

Ninth Circuit.

Filed Feb. 26, 1997.

ORDER ON RECONSIDERATION

Pending before the court is plaintiffs' motion to reconsider the court's dismissal of this action. For the reasons set forth below, the motion is denied.

I.

STANDARDS

"Under the 'law of the case' doctrine a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States* v. *Alexander*, -- F.3d --, 97 Cal. Daily Op. Serv. 784, 97 D.A.R. 1151, 1997 WL 37294, *2 (9th Cir. February 3, 1997) (citing *Thomas* v. *Bible*, 983 F.2d 153, 154 (9th Cir.), cert. denied, 508 U.S. 951 (1993)). Although motions to reconsider are directed to the sound discretion of the court, *see Kern-Tulare Water Dist.* v. *City of Bakersfield*, 634 F. Supp 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 824 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), considerations of judicial economy weigh heavily in the process. Thus, Local Rule 230(k) requires that a party seeking reconsideration of a district court's order must brief the "new or different facts or circumstances [which] were not shown upon such prior motion, or what other grounds exist for the motion." Generally speaking, before reconsideration may be granted there

must be a change in the controlling law, facts or other circumstances, the need to correct a clear error, or the need to prevent manifest injustice. *Alexander*, *supra*, at *2.

As with motions to alter or amend a judgment made pursuant to Fed. R. Civ. P. 59(a), motions to reconsider are not vehicles permitting the unsuccessful party to "rehash" arguments previously presented, *see Costello* v. *United States Government*, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991). Nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling. *Fay Corp.* v. *BAT Holdings One, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987), *aff'd*, 896 F.2d 1227 (9th Cir. 1990). Finally, "after thoughts" or "shifting of ground" do not constitute an appropriate basis for reconsideration. *Id.* These relatively restrictive standards "reflect[] district courts' concern for preserving dwindling resources and promoting judicial efficiency." *Costello*, 765 F. Supp. at 1009.

Below, the court considers the arguments tendered by plaintiffs in support of their motion to reconsider. In doing so, the court notes that at times it is difficult to discern whether plaintiffs are merely tendering the same arguments which the court has rejected, thereby failing to meet the standards of Local Rule 230(k), whether they are tendering different arguments which were available to them prior to the court's resolution of the case, thereby simply "shifting grounds" in violation of the principles of judicial economy, or whether they are presenting arguments that were available to them, but were withheld for reasons which do not justify the conduct.[1]

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[1] It appears that plaintiffs simply believe that the court is in error. Of course, such a conviction is an insufficient basis for a motion to reconsider, but rather properly forms the basis for an appeal. As explained in the text, mere error is an insufficient basis for reconsideration and the previous decision must either be clearly erroneous or result in extreme injustice. Whatever else might be true of the court's previous order, even if it is in error, that error is hardly clear, nor has plaintiff demonstrated any basis for suggesting extreme injustice.

II.

THE FOURTEENTH AMENDMENT

A. EQUAL PROTECTION VERSUS DUE PROCESS

Plaintiffs' complaint does not invoke the Due Process Clause but rather specifically alleges that the California milk scheme which it attacks violates the Equal Protection Clause. See Introductory Statement. Moreover, in response to the defendants' motion to dismiss, plaintiffs did not raise a due process claim. Now, however, plaintiffs cite cases which arose under the Due Process Clause. It is unclear whether plaintiffs are actually seeking to make a due process argument or whether these citations simply constitute imprecise analysis. Either way, it would appear inappropriate to consider a due process claim at this late stage. Accordingly, the court will analyze the Fourteenth Amendment claim on an equal protection basis only.

B. LEVEL OF REVIEW

Although plaintiffs imply otherwise, the Ninth Circuit has specifically held that state laws which regulate the milk industry comply with the Equal Protection Clause so long as they satisfy the rational basis test. *Country Classic Dairies* v. *Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988) (milk pricing laws). In *Country Classic Dairies*, the court observed that such "regulation amounts to local economic regulation; this court may 'presume the constitutionality of ... discriminations and require only that the classification challenged be rationally related to a legitimate state interest.'" *Id.* (quoting *New Orleans* v. *Dukes*, 427 U.S. 293, 303 (1976)(per curiam)). Thus, the issues here are scrutinized under the rational basis test.[2]

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[2] Defendants claim that there is no classification because the standards apply equally to all milk producers and distributors. That claim appears to miss the point that every statute by addressing a subject matter distinguishes that subject from all other instances of the same class. Thus, the statute at bar, by regulating milk, distinguishes that product from other foods. The court need not address the issue at length, however, since I conclude that the California milk scheme passes constitutional muster under the rational basis test.

A statute passes the rational basis test so long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller* v. *Doe by Doe*, 509 U.S. 312, 320 (1993) (citations omitted). The Supreme Court has explained that a statutory classification fails rational basis review only when it "rests on grounds wholly irrelevant to the achievement of the state's objective." *Id.* at 324 (citations and internal quotations omitted). Indeed, if it is possible to "reasonably conceive [a] state of facts" the statute addresses, the statute will pass constitutional muster. *Id.*[3]

In its original order, the court found that the statute satisfied the rational basis test premised upon both nutritional and price stabilization bases. The plaintiffs seeks reconsideration asserting that neither basis represented the "true motive of the California legislature, and that the scheme does not serve either purpose very well." As I now explain, neither premise suffices to undermine the court's confidence in its previous order.

The first ground fails because the issue of the legislature's "true motive" in this context is not a factual issue, and thus is not subject to a factual challenge.[4] As the Supreme Court has explained, a classification withstands equal protection attack "if there is a rational relationship between the disparity of treatment

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[3] The court wishes to be clear. Its recitation and application of the rational basis test for resolutions of claims arising under the Equal Protection Clause where there is neither a fundamental right nor a suspect class in issue is not an endorsement of those standards, but simply an acknowledgment of my duty as a subordinate court.

[4] As I have previously observed "of course, to speak of legislative motive as contrasted with legislative intent, is to speak in terms of a literary device. While members of the legislative body have minds, the legislative body itself does not. Thus, to speak of 'legislative motivation' is to speak in terms of a seductive metaphor. 'Legislative intent,' on the other hand, describes a legal term of art. It addresses the court's duty to determine what the legislative body provided for in the statute." *Service Employees Int'l Union* v. *Fair Political Practices Comm'n*, 747 F. Supp. 580, 585 n. 8 (E.D. Cal. 1990), *aff'd*, 955 F.2d 1312 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992).

and some legitimate governmental purpose." *Heller*, 509 U.S. at 320 (emphasis added) (citations omitted). The legislature need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger* v. *Hahn*, 505 U.S. 1, 15 (1992) (citations omitted). Rather, a statute withstands an "equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Comm., Inc.*, 508 U.S. 305, 313 (1993) (citations omitted). Indeed, the High Court has specifically held in a First Amendment context that the state is not precluded from advancing "interests . . . concededly . . . not asserted when the prohibition was enacted into law." *Bolger* v. *Young's Drug Products Corp.*, 463 U.S. 60, 71 (1983).

This treatment of the legislative purpose served by a statute as a legal rather than factual question completely undermines plaintiffs' efforts to introduce evidence suggesting less worthy motives attributable to the adoption by California of the statutes in issue. In sum, where a statute does not involve fundamental rights or suspect classifications, it is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it ... whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320 (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Plaintiffs' second ground for attacking the court's finding that the statute satisfies the Equal Protection Clause is equally unpersuasive. "A state, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* at 320 (quoting *Beach Communications*, 508 U.S. at 315). The Supreme Court has explained that we "are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends ... 'the problems of government are practical ones and may justify, if they do not require, rough accommodations ...'" *Id.* at 320 (quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)). In this very context, the Ninth Circuit has explained that a hypothesized rational basis existed for the statutes in question and

concluded that it was not the role of the court to decide whether the regulation could in fact achieve the hypothetical objective. *Country Classic*, 847 F.2d at 596.[5] Thus, plaintiffs' claim that the regulation does not effectively further the purported intent of Congress is of no avail.

III.

COMMERCIAL SPEECH

In their motion to reconsider, the plaintiffs raise for the first time an argument that California's milk regulating statutes limit their commercial speech in violation of the First Amendment. For the reasons cited above in the standards section, this argument cannot be considered.[6]

The court will pause only long enough to note that the laws under attack do not prohibit speech, but rather, the marketing of certain types of milk no matter what words the distributors wish to place on the cartons. Plaintiffs' complaint is that the California regulatory scheme in effect renders it impossible for them to market their product in California in the first place. Under these circumstances, what labels they might choose to put upon their cartons if they could market their product is an issue which is, to say the least, not ripe for decision.

IV.

THE COMMERCE CLAUSE

The plaintiffs, citing extensive legislative history not referred to in their original papers, seek to demonstrate that Congress did

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[5] Given these conclusions, the court will resist the temptation of demonstrating that plaintiffs' own evidence suggests the existence of a rational basis for the statute. *See* Appendix, Tab 7 and Tab 15.

[6] Plaintiffs fail to demonstrate new or intervening facts or law, and fail to explain why the argument is raised for the first time on a motion to reconsider. Given that the local rules of this court have the force of law, *Professional Progress Group* v. *Dept. of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994), there is simply no basis for this court to address this issue.

not clearly intend the Farm Bill to preempt the NLEA. These arguments cannot prevail. Before the court can consider this legislative history, plaintiffs must raise an ambiguity in the text of the statute itself. *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). The court previously explained how the Farm Bill amended NLEA, see Order, filed September 25, 1996, at 7-9. For the reasons stated therein, the statute clearly exempts the California regulatory scheme from the NLEA's provisions, and resort to the legislative history is unnecessary and thus inappropriate.

The plaintiffs' second prong of this attack is that, even assuming that Congress clearly and unambiguously exempted California from the reach of the NLEA, it did not exempt California from the limitations of the dormant Commerce Clause. *See United Egg Producers* v. *Dept. of Agriculture*, 77 F.3d 567 (1st Cir. 1996) (holding the statute considered therein only permitted such regulation not violating the dormant Commerce Clause); *see also Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992)(statute simply saves from preemption under the Federal Power Act such state authority as was otherwise lawful). Obviously, the effect of the dormant Commerce Clause turns on the terms of the statute under review. As I now explain, it appears to this court that the Farm Bill clearly exempts California from the strictures of that clause.

Section 144 of the Farm Act provides that "[n]othing in this Act or any other provision of law shall be construed to preempt . . ." California from directly or indirectly regulating the compositional and labeling standards of milk. Thus, the question becomes whether "any other provision of law" specifies with sufficient clarity that California is exempted from the effects of the dormant Commerce Clause. As I now explain, the language Congress employed expressed its intent with complete clarity and the plaintiffs have failed to explain why the court should believe otherwise.

The issue is one of statutory construction, albeit one burdened with a special requirement of clarity. As with any such issue, resolution of the question of whether the phrase "and other provision of law" includes constitutional adjudication requires as a first inquiry whether the phrase has been authoritatively construed. *See, e.g., United States* v. *Hubbard*, 856 F. Supp. 1416, 1418

(E.D. Cal. 1994). Since it appears that neither the Supreme Court nor the Ninth Circuit has spoken to the subject, the issue becomes one of examination of the terms employed by Congress.

The court believes that the issue plainly resolves against plaintiff whether viewed as a matter of ordinary speech, *see Mills Music Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985)("it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose'") (citations omitted), or as a term of art, see *Moskall* v. *United States*, 498 U.S. 103, 121 (1990) (Scalia J., dissenting) ("when a statute employs a term with a specialized legal meaning ... that meaning governs").

Both as a matter of ordinary usage, *see* WEBSTER'S THIRD UNABRIDGED INTERNATIONAL DICTIONARY (1976), p. 1279,[7] and as a term of art, see BLACK'S LAW DICTIONARY (6th ed. 1990), p. 884,[8] the word "law" includes reference to binding judicial decisions. The word "provision" in the phrase engenders no ambiguity since it simply means "the act or process of providing," *see* WEBSTER'S, *supra*, at p. 1827, for which on the same page the dictionary gives as a synonym "supply." Thus, the phrase means, *inter alia*, the supplying of a rule by virtue of binding judicial decision. In sum, for the purposes here considered, the phrase "provision of law" includes the Supreme Court's decisions defining the operation of the dormant Commerce Clause. It appears to the court that the language employed by Congress in the Farm Bill was as expansive and inclusive as it could find, and there appears to be no reason, other than the enthusiasm of plaintiffs' advocacy, to depart from that conclusion.

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[7] "a rule . . . that is prescribed . . . as binding by a supreme controlling authority . . . (as a . . . judicial decision)."

[8] "a body of rules of action or conduct prescribed by controlling authority and having binding legal force."

V.

ORDER

For all the above reasons, plaintiffs' motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED: February 25, 1997.

/s/ LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHAMROCK FARMS COMPANY AND SHAMROCK FOODS COMPANY, PLAINTIFFS-APPELLANTS,

v.

ANN M. VENEMAN, SECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA, RICHARD TATE, CHIEF, MILK AND DAIRY FOODS CONTROL BRANCH, DIVISION OF ANIMAL INDUSTRY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA, DEFENDANTS-APPELLEES.

No. 97-15428.

D.C. No. CV-S-96-889-LKK

Filed August 17, 1998.

O R D E R

Before: D.W. NELSON, BOOCHEVER, and REINHARDT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.